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## THE *MIRANDA* WARNING

Frederick Schauer\*

### I. INTRODUCTION—ISOLATING *MIRANDA*'S IMPORT

Largely as a consequence of American television and movies, *Miranda v. Arizona*<sup>1</sup> may well be the most famous appellate case in the world. On the screen, innumerable actors playing American police officers give *Miranda* warnings to other actors playing suspects, a portrayal that reflects the reality of genuine police officers giving genuine *Miranda* warnings to genuine suspects millions of times every year. Indeed, such has been the influence of *Miranda* that Russian television cops give something like a *Miranda* warning to suspects even though no actual Russian law imposes such an obligation on real Russian cops.<sup>2</sup> And it is said that in countries where no such right actually exists, suspects have still been known, when arrested, to demand their *Miranda* rights.<sup>3</sup>

Among the most interesting dimensions of *Miranda*'s worldwide fame is that the case's prominence is largely a function of the warning itself.<sup>4</sup> Television and motion pictures feature *Miranda* warnings not because of any suspected viewer interest in whether suspects actually *have* a right to remain silent,<sup>5</sup> nor on account of the underlying substance of the right to have a lawyer during interrogation,<sup>6</sup> nor because the

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1. 384 U.S. 436 (1966).

2. See Jennifer Ryan Tishler, *Menty and the Petersburg Myth: TV Cops in Russia's "Crime Capital,"* 10 J. CRIM. JUST. & POPULAR CULTURE 127, 138 (2003).

3. See NEAL STEPHENSON, IN THE BEGINNING . . . WAS THE COMMAND LINE 53–54 (1999).

4. See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (noting that *Miranda* is "part of our national culture").

5. Although *Miranda* emphatically affirms the existence of a right to remain silent, 384 U.S. at 445–58, recognition of that right as a component of the Fifth Amendment—apart from the question whether (and when) a suspect or defendant must be informed of the right—long predates *Miranda*. See *Turner v. Pennsylvania*, 338 U.S. 62, 63 (1949); *McCarthy v. Arndstein*, 262 U.S. 355, 359 (1923); see also *Escobedo v. Illinois*, 378 U.S. 478 (1964). The most recent delineation of the scope and limits of right to remain silent is *Berghuis v. Thompson*, 560 U.S. \_\_\_, 130 S. Ct. 2250 (2010).

6. See *Massiah v. United States*, 377 U.S. 201, 204 (1964). On the right to counsel during

general public is concerned about the right to appointed counsel for the indigent.<sup>7</sup> None of this, to put it mildly, makes for good theater. What is good theater is the ritual of the arrest, and the *Miranda* warning, typically given in almost exactly the terms set forth in the Supreme Court's opinion, is a prominent feature of the ritual, even apart from the role that the warning is actually designed to serve.

Professor Kamisar—with his characteristic attention to detail in support of spirited argument—provides an insightful judicial and political history of the retrenching that has marked much of *Miranda*'s history since the Supreme Court's decision in 1966.<sup>8</sup> In lamenting *Miranda*'s erosion, I largely sympathize with Kamisar. But if there is a worry about the erosion of *Miranda*,<sup>9</sup> it must be a worry not about the erosion of the right to remain silent itself, which existed independent of *Miranda*,<sup>10</sup> nor about the right to counsel during interrogation, whose recognition and enforcement again preceded *Miranda*.<sup>11</sup> Instead, it must

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interrogation, and its relation to the right to remain silent, see Marcy Strauss, *The Sounds of Silence: Reconsidering the Right to Remain Silent Under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 817 (2009).

7. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

8. Yale Kamisar, *The Rise, Decline, and Fall (?) of Miranda*, 88 WASH. L. REV. 965 (2012).

9. Although I agree with much of Kamisar's concerns about *Miranda*'s erosion, or shrinking, I part company with his belief, expressed more insistently in Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010), that there is something procedurally unusual and unfortunate in so-called stealth overruling. In a world of great judicial candor, compare David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987), with Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990). See generally Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995); Symposium, *Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?*, 64 N.Y.U. ANN. SURV. AM. L. 443 (2009), the substantial erosion of *Miranda* by a Court unwilling to overrule it explicitly might be a concern, but that is not our world. Thus, the same erosion-coupled-with-denial phenomenon existed in, inter alia, the Supreme Court's absurd claim in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), that it based its decision in large part on *Dennis v. United States*, 341 U.S. 494 (1951), the Court's effective but unacknowledged (until later, see *Hudgens v. NLRB*, 424 U.S. 507 (1976)) overruling of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968), in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and, perhaps most prominently, the erosion of *Plessy v. Ferguson*, 163 U.S. 537 (1896), in *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), *Sipuel v. Oklahoma*, 332 U.S. 631 (1948), *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin v. Oklahoma*, 339 U.S. 637 (1950). Although there is no article precisely making such a claim, I would not be surprised to find that supporters of *Plessy* had, from 1938 until the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), lamented the "stealth overruling" of *Plessy*. Stealth overruling is now so common that it can hardly be considered stealthy, and, moreover, seems to be a common way for the Court to diminish the import of an unpopular precedent while waiting for the right political and legal environment to overrule it explicitly.

10. See *supra* note 5.

11. See *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963) (noting unconstitutional absence of a "lawyer to advise Rideau of his right to stand mute").

be a worry about the requirement that the police provide a warning in a certain way under certain conditions.<sup>12</sup> Once we understand the import of various pre-*Miranda* decisions, we can appreciate that *Miranda* is about the warning itself, rather than about what the warning is a warning of. And when we understand *Miranda* in this way, we can focus on just what role the warning is designed to serve, and what the Court in *Miranda* thought it was doing in specifying almost exactly the form that the warning was to take. It is precisely this focus that will be the subject of my attention in this Response.

In being about a warning, *Miranda* is about communication. Specifically, it is about two different dimensions of communication. One of these is the substance of *Miranda*'s holding, which is that police officers are required—on pain of inadmissibility of the evidence obtained absent a communication—to communicate to suspects under certain conditions their right to remain silent, to have a lawyer present for the interrogation, and to appointed counsel if they are indigent.<sup>13</sup> And the other communicative dimension of *Miranda* is the way in which the Supreme Court communicated *its* requirements to police officers—the primary subjects of the ruling—in extraordinarily clear and rule-like terms. I will consider these two communicative dimensions in turn.

## II. *MIRANDA* AS RULE

Even before *Miranda*, involuntary confessions were plainly understood to violate the Fifth Amendment's prohibition on compelled self-incrimination and the Fourteenth Amendment's guaranty of due process.<sup>14</sup> And even before *Miranda*, and still, suspects were and remain permitted to waive their privilege against self-incrimination.<sup>15</sup> In theory, of course, the law might simply have prohibited self-incrimination, making the questions of waiver and voluntariness irrelevant. Thus, in a

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12. This is not to say that Kamisar and others might not also be concerned about a possible erosion of the rights to remain silent and to counsel during interrogation. But although such concerns might run parallel to the concerns about *Miranda*, and might be the product of a common cause—decreasing Supreme Court and lower court sympathy with the rights of defendants in criminal cases—they would neither run *through* *Miranda* nor, except in a much more complex and attenuated way, be *caused* by any erosion of *Miranda*'s strength.

13. *Miranda v. Arizona*, 388 U.S. 443, 444–45 (1966).

14. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Townsend v. Sain*, 372 U.S. 293 (1963); *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Rogers v. Richmond*, 365 U.S. 534 (1960); *Spano v. New York*, 360 U.S. 315 (1959); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Brown v. Mississippi*, 297 U.S. 278 (1936).

15. See *United States v. Hubbell*, 530 U.S. 27 (2000); *Colorado v. Spring*, 479 U.S. 564 (1987); *Colorado v. Connelly*, 479 U.S. 157 (1986).

substantially more defendant-protective world—one that exists nowhere in the real world as we know it—the law could simply require the police to make their case against a suspect without the suspect’s assistance at all, whether voluntary or not. Such an approach might be based on dramatically different views of the nature of criminal prosecution than the one that actually prevails in the United States and elsewhere. Alternatively, and slightly more plausibly, the law might be based upon a highly rule-based perspective on the realities of self-incrimination. Just as the law of evidence prohibits the use of even probative character evidence partially because of a fear of overvaluation or other misuse by the jury,<sup>16</sup> and just as First Amendment doctrine bars almost all forms of viewpoint regulation in the public arena because of fears about the dangers of allowing to government the power to draw viewpoint-based distinctions,<sup>17</sup> so too might a fear of the abuses of self-incrimination lead to an admittedly and substantially over-inclusive prohibition on self-incrimination. Period. Such an approach would assuredly prevent the misuse or over-use of self-incriminating statements, but would do so at a price that no existing society appears willing to pay.<sup>18</sup>

However unrealistic a total prohibition on self-incrimination may be, noting the possibility, even if only in theory, highlights the way in which *Miranda* itself can be understood as a similarly rule-based strategy for dealing with the problem of involuntary self-incrimination. Assuming that involuntary self-incrimination is indeed a problem—and a wealth of history and data supports the soundness of that assumption<sup>19</sup>—and assuming that its total prohibition is understandably off the table, *Miranda* emerges as a rule-like approach to dealing with the problem of involuntary self-incrimination.<sup>20</sup> The decision produces a rule designed to address this problem, albeit a rule less stringent than total prohibition,

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16. FED. R. EVID. 404; see Barrett J. Anderson, Note, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912 (2012); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial By Character*, 73 IND. L.J. 1161 (1998).

17. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695 (2011); Geoffrey R. Stone, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL’Y 461 (1986).

18. Indeed, the conclusion in the text is implicit in the fact that, at least in the United States, a simple requirement that a lawyer be present for any interrogation has never attracted significant support. See Kamisar, *supra* note 8, at 1023.

19. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010).

20. See Paul Marcus, *It’s Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 643–44 (2006).

less stringent than even a requirement that counsel be present at all interrogations, and less stringent than even a requirement that counsel be present for any valid waiver of the right to remain silent. Nevertheless, it is important to remember that the underlying goal of the rule represented by *Miranda* is to lessen involuntary self-incrimination. That is what lies in the background of the entire debate. Genuinely voluntary self-incrimination remains constitutionally permissible, and thus distinguishing genuinely voluntary self-incrimination from involuntary self-incrimination, as well as guarding against involuntary self-incrimination, is the aim of this entire area of constitutional doctrine.<sup>21</sup> Although Professor Kamisar and many others (including myself) decry the old voluntariness test,<sup>22</sup> it is important to bear in mind that involuntariness is still the real concern. A test—or rule, if you will—is different from a goal. If the involuntariness *test* is mistaken, which Kamisar correctly thinks it is, it is not because we have identified the wrong goal, but because the involuntariness test is a poor way of implementing the involuntariness goal, for all of the reasons that Kamisar persuasively explains.<sup>23</sup>

So if lessening or eliminating involuntary confessions—but not all confessions and not even all non-counsel-advised confessions—is the goal, it would then seem that the obvious solution would be to prohibit exactly what we are concerned with. And, indeed, this was long the approach, as exemplified in the voluntariness test and in a raft of pre-*Miranda* decisions.<sup>24</sup> If involuntary confessions are the real danger, then why not simply prohibit involuntary confessions, and prohibit using their products? After all, in numerous other areas, the law directly prohibits just what it wants to lessen. The prohibitions on murder, rape, larceny, burglary, and the sale of narcotics, for example, are couched almost completely and directly in the terms of the actual social concern.

Yet although such direct prohibitions are widespread, so too are less direct ones. The immediate target of numerous legal prohibitions is something other than, or something more than, exactly what the law

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21. There are shades of difference among involuntariness, coercion, compulsion, and related ideas, but sorting out the differences is far afield from the focus of this Response. It is worth noting, however, that a careful examination of the very idea of coercion in all of its philosophical, psychological, political, sociological, and economic dimensions—ALAN WERTHEIMER, *COERCION* (1987), would be an excellent starting place—might usefully inform answering the question whether the very idea of voluntariness best captures the important underlying concerns.

22. *E.g.*, Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865 (1981); Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 102.

23. Kamisar, *supra* note 8, at 1025–32.

24. *See* cases cited in *supra* notes 5, 6, 10, 11.

seeks to eliminate (or, at times, encourage). Such prohibitions, however, must still be understood as but indirect approaches to serving the same goal as direct ones. Prohibitions on possessing the instrumentalities of crime—burglar tools<sup>25</sup> or drug paraphernalia<sup>26</sup>—fit this mold, and in many other domains legal goals are commonly embodied only indirectly, and only probabilistically.<sup>27</sup> *New York Times Co. v. Sullivan*,<sup>28</sup> for example, is premised on the idea that true statements about public officials (and, later, public figures<sup>29</sup>) should flourish and false ones should not. The *Sullivan* rule is cruder, however, granting protection to many false statements in order that the maximum number of true ones will be published.<sup>30</sup> Similarly, the Sherman Act seeks to prevent trade-restraining business practices, but the various per se rules that the Supreme Court has adopted to effectuate the Sherman Act's deeper goals are ones that may punish or deter non-trade-restraining practices in order to accomplish the background goals most effectively.<sup>31</sup> And among the purposes of the Securities Act of 1933 and the Securities Exchange Act

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25. The indirect nature of prohibitions on burglar tools is especially obvious when prosecutions are aimed at the possession of individually benign items whose possession in combination is far more suspicious. *See, e.g.*, *People v. O.M.*, No. H023435, 2002 Cal. App. Unpub. LEXIS 6565 (Cal. Ct. App. July 16, 2002) (six broken spark plugs—commonly used for breaking glass silently); *People v. Trimmer*, No. A095983, 2002 Cal. App. Unpub. LEXIS 6520 (Cal. Ct. App. July 15, 2002) (crowbar, hacksaw, and lock pick); *Burgess v. Bintz*, No. 00 CIV. 8271, 2002 U.S. Dist. LEXIS 7168 (S.D.N.Y. Apr. 24, 2002) (crowbar and bent coat hanger).

26. *E.g.*, KAN. STAT. ANN. § 21-5701(f)(12)(B) (L) (Supp. 2011); W. VA. CODE ANN. § 60A-4-403a (2010).

27. *See* Frederick Schauer, *Bentham on Presumed Offences*, 23 UTILITAS 363 (2011).

28. 376 U.S. 254 (1964).

29. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

30. *See* *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 301 (1971) (White, J., concurring). And thus I agree with Kamisar and others, for example, Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1 (2001); David Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958 (2001), that the use of rules—rules *simpliciter*—is ubiquitous in constitutional law, and that there is no special category of prophylactic rules. Every constitutional rule, whether the rule emanating from *Sullivan*, or the four-part test for commercial speech restrictions in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), or the intermediate scrutiny rule for sex discrimination that protects men as well as women, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982), will encompass more than would direct application of the rule embodied in the constitutional text, precisely because such over-inclusion (as well as under-inclusion) is just how rules operate, and just what rules are. *See* FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991) [hereinafter SCHAUER, *PLAYING BY THE RULES*]. The phrase "prophylactic rule" is accordingly best seen as a simple redundancy, sort of like "null and void" or "cease and desist."

31. *See* *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) (price-fixing); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (resale price maintenance), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

of 1934 is the prevention of trading on inside information, but Section 16(b) of the 1934 Act, rather than simply prohibiting insider trading, penalizes (through civil liability) with a sharp-edged rule a wide swath of so-called short-swing trades—most but not all of which will involve the actual trading on inside information that is the statute’s real goal.<sup>32</sup> And perhaps most pervasively, traffic laws aim to achieve safe driving not simply by punishing unsafe or imprudent or unreasonable driving, but by the use of crisply delineated speed limits, recognizing that such limits may well over-deter some safe driving and under-deter some unsafe driving.<sup>33</sup>

Viewed through this lens of indirect prohibitions in the service of a goal that might be served less effectively with a direct prohibition, many questions surrounding *Miranda* are now transformed. Professor Kamisar sees the controversy about *Miranda*, and the ebbs and flows (mostly ebbs) of its political and judicial history, largely in terms of a battle between pro-police and pro-defendant (or, better, pro-defendants’ rights) forces. In this he appears largely correct, but we need to examine more carefully the missing steps that would support his conclusion. Just what makes a direct prohibition on exactly what we are concerned with—a straightforward prohibition on involuntary confessions—a pro-police stance, and *Miranda*’s actual and indirect rule requiring disclosure a pro-defendant or pro-rights one?

As with most rule-based approaches to more broadly defined problems, the concern here is with mistakes in applying the broadly phrased rule.<sup>34</sup> More specifically, the concern about direct application of a voluntariness standard is not just a replay of the traditional debates between rules and standards.<sup>35</sup> Rather, it is primarily a worry that potential mistakes under a broadly worded standard would tilt systematically in one direction rather than another—that involuntary statements would be found to be voluntary far more often than voluntary statements would be found to be involuntary. Indeed, such a skewing of mistakes should not be surprising. It is a necessary characteristic of all

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32. See 15 U.S.C. § 78p(b) (Supp. 2011).

33. See Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U. L. REV. 155 (1999).

34. See generally FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 13–35, 188–202 (2009) [hereinafter SCHAUER, THINKING LIKE A LAWYER]; SCHAUER, PLAYING BY THE RULES, *supra* note 30 *passim*.

35. See, e.g., Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181 (1996); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000).



claimants of *Miranda* rights that they have at one point been suspects, broadly defined, and it is a necessary characteristic of all claimants of *Miranda* rights in court that they are defendants in criminal cases. And it is a non-necessary but contingent truth that most criminal defendants are guilty of the crimes with which they have been charged, and that many of those who are not guilty of the crimes with which they are charged are guilty of other crimes, crimes often identical to or resembling or associated with the crimes with which they have been charged.<sup>36</sup> Only on television, in the movies, and in page-turner crime novels do totally innocent individuals constitute a high percentage of the defendants in the criminal cases that are brought to trial.

That most defendants are guilty does not suggest that a concern with their rights is misguided.<sup>37</sup> Even the guilty have rights to procedural fairness. Moreover, the existence of procedural rights for the guilty lessens the likelihood of prosecuting, convicting, and punishing the innocent—as Blackstone and others recognized centuries ago.<sup>38</sup> But the fact that the bearers of defendants' rights are systematically unappealing individuals, largely because of their guilt, goes a long way towards explaining a fear that the rights such individuals properly claim may be under-recognized in practice. And thus, more specifically, the fact that the confessions of those whose confessions may have been obtained by trickery or even force have a substantial likelihood of actually being true will make it predictably and systematically the case that such involuntary confessions will be deemed voluntary far more often than voluntary confessions will be found to be involuntary.<sup>39</sup>

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36. This conclusion is an extrapolation from existing figures on guilty pleas (some of which will admittedly be by innocent defendants) and on conviction rates at trial (some of which will be erroneous), see THOMAS H. COHEN & TRACEY KYCELHAHN, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006* (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc06.pdf>; *Felony Defendants, Summary of Findings*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=231> (last visited Feb. 23, 2013), but even the most conservative extrapolation is sufficient to support the point in the text.

37. Gerard V. Bradley, *Plea Bargaining and the Criminal Defendant's Obligation to Plead Guilty*, 40 S. TEX. L. REV. 65 (1999), supports the conclusion that most defendants are actually guilty, but takes that conclusion as grounding an obligation on the part of guilty defendants to plead guilty, a conclusion with which I disagree, even though I agree with Bradley's factual premise.

38. "[I]t is better that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES \*358. For interesting discussions and analysis of the Blackstonian maxim and its historical and contemporary variants, see Larry Laudan, *TRUTH, ERROR AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* (2006); Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997).

39. And thus Kamisar is correct to distinguish disapproval of police methods of obtaining a confession from the unreliability of that confession. Kamisar, *supra* note 8, at 967. It is true that involuntary confessions are less likely reliable than, say, contraband seized in violation of the

Because the direct application of a vague voluntariness test will thus result in errors of a systematically skewed variety, the attractiveness of a rather more concrete—and thus error-minimizing<sup>40</sup>—rule becomes more apparent. But why *this* rule? Why should the Constitution be interpreted to require a warning, rather than a signed waiver, a witnessed waiver, an attorney-advised waiver, a witnessed or recorded interrogation, or any of some number of other devices that would more straightforwardly specify and make more precise (more of a rule) the less precise (more of a standard) idea of voluntariness?

It is not clear what the answer to this question is. Nor is it clear what the Supreme Court in *Miranda* thought the answer was. It is also not clear Kamisar has an answer either, except that he believes that at least some of these remedies—mandatory attorney presence, for example—would be politically impossible.<sup>41</sup> But in his discussion of *Mincey v. Arizona*,<sup>42</sup> Kamisar does expose and discuss the weaknesses of the voluntariness test in an environment in which case-by-case determinations of voluntariness are logistically burdensome and likely to be systematically skewed in the direction of excess deference to determinations below.<sup>43</sup> This is especially apparent in *Mincey* itself, involving determinations made first by police officers, and then by prosecutors, and then by elected trial judges, and then by elected state appellate judges.<sup>44</sup> One need not accuse any of these actors of bad faith to suspect that all the incentives for all of them are in the direction of

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Fourth Amendment, but only in the world of fantasy are all of the procedures we find morally or constitutionally impermissible (or both) also ineffective. Torture is of course the obvious example, but coerced confessions present the same issues. Indeed, although Kamisar is right to castigate the inflammatory political rhetoric that followed *Miranda*, Kamisar, *supra* note 8, at 972–75, it seems unlikely that the panoply of decisions protecting defendants' rights would have no effect on the crime-restricting abilities of the police and thus no effect on the crime rate. Obviously, sorting out individual causal influences in a world of multiple causation is always difficult and often impossible. Other factors—education, poverty, the general economic environment, and much else—plainly influence the crime rate. Still, the rhetorical excesses of Senator McClennan, then-candidate Nixon, and many others should not obscure the likelihood that making things marginally more difficult for the police will make things marginally less difficult for those the police are attempting to apprehend or restrict.

40. More precisely, a rule would be discretion-minimizing, and would thus lessen the errors occasioned by misuse of that discretion. As with any rule, however, minimizing these errors would be bought at the cost of increasing the number of errors of rule-dependent under-inclusion and over-inclusion. See SCHAUER, *PLAYING BY THE RULES*, *supra* note 30, at 149–55; SCHAUER, *THINKING LIKE A LAWYER*, *supra* note 34, at 29–35.

41. Kamisar, *supra* note 8, at 1023.

42. 437 U.S. 385 (1978).

43. Kamisar, *supra* note 8, at 968–70.

44. *Mincey*, 437 U.S. at 387–88.

under-protecting Fifth and Fourteenth Amendment rights. Claiming to be a stronger protector of Fourth, Fifth, and Sixth Amendment rights is not, in general, a strategy designed to win elections for district attorney or (elected) judge. And it is the rare police department that bases promotion of its officers—short of behavior incurring civil liability—very much on the vigor with which they guard the rights of suspects.

Yet even if the circumstances of *Mincey* underscore the need for a rule-based approach, it is far less clear why the rule effectuating the goal of voluntariness would focus on the warning, rather than on some crisp indicator of voluntariness or involuntariness. We can understand somewhat easily the relationship between the per se rule against price fixing and the Sherman Act's prohibition on contracts, combinations, and conspiracies in restraint of trade or commerce.<sup>45</sup> And we can understand (even if not necessarily agree with) the relationship between a "best interests of the child" standard and its (historically) frequently instantiating rule creating a strong presumption in favor of granting custody to the mother.<sup>46</sup> But the relationship between the voluntariness idea and the rule in *Miranda* seems somewhat less direct and thus somewhat harder to tease out.

Typically, rules use statistically reliable instantiations of their background justifications as their operative triggers, as with the operative trigger of a numerical speed limit, which is a statistically reliable but not perfect instantiation of unsafe driving. These operative triggers are the imperfect but probabilistically useful indicators of the furtherance of their background justifications. Price-fixing typically but not necessarily indicates a hindrance (restraint) of trade; and, historically, maternal custody was a statistically reliable indicator of furthering a child's best interests. In the context of *Miranda*, therefore, the claim would be that receiving a warning—which is what *Miranda* requires and what makes the case distinctive—is a statistically reliable indicator that a subsequent waiver was voluntary. This may well be true, but note that it does require a series of inferential links—from a suspect's receipt of the warning to the suspect's appreciating the content of the warning to the suspect's recognizing that waivers are not required to the suspect signing a waiver voluntarily. Each of these steps may well be statistically justified, but it is hardly obvious that they are. Indeed, there is some indication that one or more may not be.<sup>47</sup> Consequently, if

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45. 15 U.S.C. § 1 (2006).

46. See Pamela Laufer-Ukeles, *Selective Recognition of Gender in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1 (2008).

47. See Kassin et al., *supra* note 19.

genuine voluntariness is the background justification, and if we understand, as we should, that background justifications may often be better served by crisp and probabilistically reliable instantiations than by direct application of the background justification, it is hardly obvious that picking the providing of a warning is the best or the most statistically reliable way of instantiating the background concern with voluntariness.

Thus, it is important to distinguish two different possible concerns about voluntariness. One is that voluntariness is simply the wrong idea—that voluntariness as the background goal is itself misguided. But this seems not to be Kamisar's concern, nor that of other defenders of *Miranda*. And thus the second concern, which does appear to be Kamisar's, is that voluntariness may be a sufficiently slippery standard such that courts, in applying it directly, will be especially inclined to find against a defendant for any of a number of reasons.<sup>48</sup> If this is so, however, and I believe it to be so, and if voluntariness remains as the appropriate background justification even if not the appropriate instantiating rule, then there needs to be some indication that some other instantiating rule is less prone to mistakes in application while still being a serviceable instantiation of the background justification. Kamisar and others are persuasive in showing us why and how *Miranda* satisfies the former—how it might be less prone to skewed mistakes in application.<sup>49</sup> But the defenders of *Miranda* have focused less than they should on demonstrating why the *Miranda* instantiation of the voluntariness background justification is more statistically well-tailored to serving the background justification than might some number of other similarly mistake-avoiding instantiations. We can be confident that some indicia of voluntariness—signing a waiver, for example—may be quite poor indicators of voluntariness, and even less statistically reliable than a *Miranda* warning. But what remains to be shown is that a *Miranda* warning, even when coupled with a voluntariness backup,<sup>50</sup> is a better rule than some number of alternatives. Perhaps it is, but the best defense of *Miranda* will recognize that compliance with *Miranda* may be an attenuated indicator of voluntariness, and that non-compliance may be an attenuated indicator of involuntariness. Without responding to this concern, the defenders of *Miranda* may wind up offering simple pro-rights versus pro-police arguments that will fail to persuade anyone on

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48. Kamisar, *supra* note 8, at 967–70.

49. Kamisar, *supra* note 8, at 1026–38.

50. See *United States v. Plugh*, 576 F.3d 135, 144 (2d Cir. 2009) (*Miranda* warnings given, but subsequent statements excluded as involuntary).

the other side.

### III. *MIRANDA* AS GUIDANCE

It is thus at least arguable that *Miranda* is a coarse and clumsy instantiation of the deeper behavior—genuine voluntariness—that the *Miranda* rule is designed to indicate. But *Miranda* may fare somewhat better when we turn to a different aspect of its communicative dimension. That is, *Miranda* may be of questionable effectiveness in conveying *to* courts and others the behavior that the *Miranda* warning is designed to indicate. But the case may be considerably more effective in conveying *from* courts, and in particular from the Supreme Court, the behavior that is required of primary actors.

Thus, the Court—having decided that the appropriate way of guaranteeing genuine voluntariness in waivers, as well as of simply assuring that suspects know of their Fifth and Sixth Amendment rights<sup>51</sup>—might simply have ruled that suspects must be adequately apprised of their rights. Had this been the outcome of *Miranda* or of a *Miranda*-like case, courts would then be required to assess whether some notification to suspects of their rights was sufficiently adequate, in much the same way that courts assess reasonableness or adequacy or satisfaction of some other largely indeterminate standard in numerous other areas of law, particularly constitutional law.<sup>52</sup>

The Supreme Court, as we know, did not take that course. Instead it came very close to mandating the exact script that the police were to use in communicating with suspects.<sup>53</sup> Indeed, it is just this dimension of *Miranda* that has played such a large role in ensuring the case's iconic status. Were police notifications less formulaic, *Miranda* warnings would make far worse theater. It is precisely the fact that most real police officers and most movie and television police officers say exactly

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51. That is, there is presumably a value in people knowing what the law is, and knowing what their rights are, independent of that knowledge's instrumental value in fostering insistence on those rights or in deterring rights-restricting official behavior.

52. Examples are legion, but a list of the most prominent ones would include the determination whether a state law is sufficiently rational or reasonable to survive minimal due process or equal protection scrutiny (*Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955)), whether a restriction on abortion places an undue burden on a woman's ability to choose (*Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)), whether government entanglement with religion is excessive (*Lemon v. Kurtzman*, 403 U.S. 602 (1971)), or whether alternative forums for communication (*United States v. Grace*, 461 U.S. 171 (1983)) or raising claims (*South Carolina v. Regan*, 465 U.S. 367 (1984)) are adequate.

53. *Miranda v. Arizona*, 384 U.S. 436, 467–73 (1966). See also *id.* at 444, where the Court notes that it is setting forth the requirements with “some specificity.”

the same thing at roughly the same time in the arrest sequence which makes *Miranda* so memorable. The so-called *Miranda* card is pretty close to the inscribed text of a Supreme Court opinion, and thus we have a situation in which the Supreme Court is giving direct and explicit guidance to primary actors—police officers—on how to behave and how to comply with the Court’s ruling.

This approach is, to put it mildly, rare. With annoying frequency, the Supreme Court chooses vagueness over specificity, preferring, it seems, to keep its options open for future cases rather than give clear guidance now, even if in doing so it admittedly constrains itself in the future.<sup>54</sup> The Court has not, for example, told trial judges or litigants what is necessary in order for an expert witness to be qualified as such or expert evidence to be admissible. Instead it has elected to list a series of factors, leaving unspecified which factors are individually necessary, and how many factors (and in what combination) are sufficient.<sup>55</sup> Much the same applies to the Court’s non-specification in any useful detail of what counts as “testimonial” for purposes of the Confrontation Clause,<sup>56</sup> or of which forms of student speech teachers and school administrators must allow in order to comply with the First Amendment,<sup>57</sup> or of which Christmas displays will violate the Establishment Clause.<sup>58</sup>

All of these examples are ones, like the interrogations at issue in *Miranda*, in which the Court is assuredly speaking to vast numbers of primary actors encountering constitutionally precarious events on a daily basis. Where the Court is speaking only to Congress, say, and only with respect to relatively uncommon occurrences—most separation of powers controversies fit this description<sup>59</sup>—to say nothing of almost unique

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54. I have discussed this on several previous occasions, albeit not in the context of *Miranda*. See Frederick Schauer, *Abandoning the Guidance Function*: *Morse v. Frederick*, 2007 SUP. CT. REV. 205 [hereinafter Schauer, *Abandoning the Guidance Function*]; Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 (1995); see also Frank Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

55. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

56. See *Williams v. Illinois*, 564 U.S. \_\_\_, 132 S. Ct. 2221 (2012); *Bullcoming v. New Mexico*, 564 U.S. \_\_\_, 131 S. Ct. 2705 (2011); *Michigan v. Bryant*, 562 U.S. \_\_\_, 131 S. Ct. 1143 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Giles v. California*, 554 U.S. 353 (2008); *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004).

57. *Morse v. Frederick*, 551 U.S. 393 (2007); see Schauer, *Abandoning the Guidance Function*, *supra* note 54.

58. *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

59. *E.g.*, *Clinton v. New York*, 524 U.S. 417 (1998); *Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *INS v. Chadha*, 462 U.S. 919 (1983); *United*

scenarios such as that in *Bush v. Gore*<sup>60</sup>—there might be little need for the Court to provide direct guidance. Case-by-case determination in such contexts is manageable, the costs of rule-based errors are large, and the advantages of rules in providing predictability for hundreds or thousands or more primary actors are largely beside the point.

By contrast, in a context in which a Supreme Court decision deals with an issue arising thousands of times a year, or, as with *Miranda*, thousands of times a day throughout the United States, and in which the Supreme Court itself hears only about eighty cases a year and even the federal courts of appeals and the state appellate courts are heavily overburdened, one might expect the Court to be more concerned than it now is or has been for years with providing direct and thus litigation-forestalling guidance. From this perspective, *Miranda* and the “*Miranda* card” are noteworthy outliers.

The *Miranda* approach to guidance—detailed and specific guidance aimed at primary actors—does not come without costs. Indeed, the strongest argument for the opposite approach is that such guidance is too Procrustean, forcing a wide diversity of behavior into a distortingly narrow model. There are, to use the examples above, wide varieties of expertise and expert evidence, statements to police officers, Christmas displays, and student speech. To attempt to lay down in advance—concretely and specifically—the appropriate way of dealing with this diversity of behavior is inevitably to commit to making and tolerating some number of mistakes in application.

So too, it might be argued, with rights notifications to suspects. Some suspects will be more able to understand the meaning and import of the typical *Miranda* warning, and others less. Some situations will make a warning relatively easy, and others will be very difficult. To attempt in advance to deal with all of these diverse situations with a standard one-size-fits-all warning is destined to failure. Or so it could be argued.

This objection is in one sense sound. For the Supreme Court to give this kind of detailed guidance to police departments and officers about constitutionally permissible police behavior would run the risk of some number of “mistakes.” In some cases, compliance with the precise *Miranda* strictures would produce at least presumptive legal and constitutional permissibility even though the warning might not be fully adequate to apprise suspects of their rights. And in others non-

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States v. Nixon, 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

60. 531 U.S. 98 (2000). Similarly likely non-repeatable and rare is *Nixon*, 418 U.S. 683.

compliance would produce unconstitutionality and consequent exclusion even though the non-complying warning would actually have provided the information sufficient to provide some suspect with everything he or she needed to understand their rights and then decide knowingly whether to waive them or not.

Such suboptimal outcomes in individual cases, however, are an inevitable part of any process of rule-based decision-making.<sup>61</sup> The real question, then, is whether custodial interrogation represents a context in which the advantages of rule-based decision-making and rule-based guidance—notice, predictability, constraint on discretion, and the like—outweigh the principal disadvantage of under- and over-inclusion vis-à-vis the rule's background justification. And in this context there is a strong argument that the advantages of crisp rules outweigh the disadvantages. We are dealing with a very frequent and repeatable event, and one in which the primary actors—the interrogating police officers—are typically not themselves legally trained, nor do they often have access to legal advice at the time of making a decision with constitutional implications. And we are dealing with a situation in which the incentives of those primary actors diverge substantially from the incentives of those—the courts, principally—who are primarily charged with the protection of constitutional rights. As such, custodial interrogation—along with many other street-level police practices—represents a situation in which notice, consistency, and predictability are likely more important than the flexibility to deal with currently unimagined situations. All of these considerations thus point in the direction of a rule-based approach. Consequently, we can see not only the *Miranda* warning itself as a rule, but also the Supreme Court's decision in *Miranda* about what the warning should say as a rule, albeit one made and implemented at a different level.

## CONCLUSION

My differences with Professor Kamisar are slight. But there are differences in tone that are worth noting. For Kamisar, *Miranda*'s subsequent history is a proxy for a larger and deeper battle between pro-police and pro-defendants' rights forces.<sup>62</sup> Kamisar sees himself, the *Miranda* majority, and the post-*Miranda* advocates of *Miranda* preservation as belonging to the latter side in this battle, with the *Miranda* dissenters—the judicial *Miranda* skeptics such as Chief

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61. See Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

62. And perhaps between liberals and conservatives. See Kamisar, *supra* note 8, at 976.



Justices Burger and Rehnquist, and scholars such as Fred Inbau—all belonging to the former.<sup>63</sup>

In drawing the battle lines in this way, Kamisar has tapped into a genuine judicial and constitutional division, one that has occasionally—as in the 1968 election—erupted into the political arena. But *Miranda*'s virtues are not just that it is a marker for one side of a longstanding debate, standing alongside *Mapp v. Ohio*,<sup>64</sup> *Gideon v. Wainwright*,<sup>65</sup> and a host of other Warren-era decisions which properly, in my view, reflect the way in which rights protected under the Fourth, Fifth, and Sixth Amendments cannot plausibly, because of the systematic unattractiveness of those who claim and defend them, be protected other than by strong and unpopular judicial intervention. Rather, *Miranda* is also important for the way in which it embodies the Supreme Court's occasional but increasingly rare willingness to understand its role as law-maker, rule-maker, and promulgator of standards of conduct for primary and constitutionally constrained actors. Recognizing *Miranda*'s substantive outcome with respect to an important dimension of modern American constitutional criminal procedure is important. But so too is recognizing the importance of *Miranda* in demonstrating—as post-*Miranda* popular culture has made clear—that the Supreme Court has the capacity to give clear and crisp instructions to the primary actors whose constitutional compliance is essential to a constitutional system. Would that the Court do so more often.

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63. In light of his larger story, and the roles played by the principal characters in it, Kamisar struggles to make sense of *Dickerson v. United States*, 530 U.S. 428 (2000). Kamisar, *supra* note 8, at 1002–08. But it is probably best simply to understand *Dickerson* as a skirmish in an entirely different battle, a battle in which Chief Justice Rehnquist is best seen as carrying the judicial supremacy banner of *Cooper v. Aaron*, 358 U.S. 1 (1958), *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), *City of Boerne v. Flores*, 521 U.S. 507 (1997), among others cases, against the departmentalists and popular constitutionalists. Compare Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending judicial supremacy), with Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (decrying judicial supremacy). However one comes out on these debates, it should be clear that any debate that puts Abraham Lincoln, Edwin Meese, Larry D. Kramer (*We the Court*, 115 HARV. L. REV. 4 (2001)), and Michael Stokes Paulsen (*The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217 (1994)) on one side and Chief Justice Rehnquist and a unanimous Warren Court (in *Cooper*) on the other defies conventional political categorization. See Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy*, 17 CONST. COMM. 455 (2000). And thus *Dickerson* is probably best understood as having remarkably little to do with *Miranda* at all.

64. 367 U.S. 643 (1961).

65. 372 U.S. 335 (1963).